




FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: The Commissioners
Staff Director
Deputy Staff Director
General Counsel

FROM: Office of the Commission Secretary 

DATE: April 26, 2002

SUBJECT: Statement Of Reasons for MUR 4982

Attached is a copy of the Statement Of Reasons for MUR 4982
signed by Vice Chairman Karl J. Sandstrom.

This was received in the Commission Secretary's Office on
Friday, April 26, 2002 at 10:54 a.m.

cc: Vincent J. Convery, Jr.
OGC Docket (5)
Information Division
Press Office
Public Disclosure

Attachment

22.04.405.3659



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 4982
Republicans for Clean Air,)
et al.)

Statement of Reasons Vice Chairman Karl J. Sandstrom

On January 23, 2002, the Commission failed on a 3-3 vote to find Reason to Believe that Charles Wyly, Sam Wyly, Republicans for Clean Air, and Bush for President, Inc. violated the Federal Election Campaign Act. The vote was based on a complaint, filed by the Deputy Campaign Manager of McCain 2000, alleging that brothers Charles and Sam Wyly, through a political organization Republicans for Clean Air, made illegal in-kind contributions to Bush for President, Inc., the principal campaign committee for then-Governor George W. Bush. The alleged contributions were in the form of television advertisements. The advertisements unfavorably compared the environmental record of the Arizona senator to that of the Texas governor. According to the complaint, the advertisements were targeted to Republican primary voters in New York, Ohio and California and were run on the weekend before the primary election in each of those states. Republicans for Clear Air ("RFCA"), the identified purchaser of the advertisements, claimed tax exempt status as a political organization under 26 U.S.C. § 527.

Standard for Assessing Complaint

Prior to initiating an investigation, the Commission must determine by an affirmative vote of at least four of its members that it has reason to believe that a violation of law has been committed. Because this finding must be made before an investigation can commence, it usually must be made without the benefit of a factual record that would enable the Commission to make an assessment of the likely truth of the allegations.¹ In determining whether there is reason to believe a violation has occurred

¹ On occasion, facts may already be in the possession of the Commission that would establish whether or not an allegation is true. For example, a complaint might allege that a political committee failed to report certain activity that might be refuted by actual reports of the committee. Unfortunately, most complaints

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("RTB"), the Commission has chosen not to speculate about whether the facts alleged by the complainant were likely to have occurred. Instead, the Commission has conditioned its finding upon an examination of the complaint. The Commission has determined that a complaint provides a basis for investigation if it alleges "sufficient specific facts" that if proven true would constitute a violation of the law.² See Statement of Reasons in MUR 5141, In the Matter of Honorable James P. Moran, Jr., *et al.*, March 11, 2002 (signed by Commissioners Mason, Sandstrom, McDonald, Smith, Thomas and Wold).

This standard seeks to appropriately balance the competing interests reflected in the law. The requirement that "sufficient specific facts" be alleged prevents the Commission from embarking on ill-defined, open-ended investigations, while enabling the Commission to fulfill its obligations as an investigatory agency. The Federal Election Campaign Act of 1971 ("FECA") does not provide for the initiation of investigations through private right of actions. The sole responsibility for investigating civil violations of the law is vested in the Commission. Basic notions of fairness require the Commission to adhere to a consistent objective standard in initiating investigations. The RTB standard that I have here articulated, and the Commission has previously employed, reflects the Commission's effort to do so.

Based on this standard and the facts set forth below, I voted to find RTB in this matter.³

Potential Violations

Roy Fletcher, Deputy Campaign Manager of McCain 2000, the principal campaign committee of Senator John McCain for the 2000 Republican presidential nomination, filed the complaint in this matter. The complaint alleges brothers Charles and Sam Wyly, operating as a political organization called Republicans for Clean Air, made an illegal in-kind contribution to Bush for President, Inc., the principal campaign committee for then-Governor George W. Bush, in the form of television advertisements. The ads were run shortly before the 2000 Republican presidential primaries in California, New York and Ohio. The content of the advertisement is the same for each state in which the advertisement ran, except that the name of the State mentioned reflects where the advertisement was being broadcast. The complainant attached copies of each of the scripts.

allege violations, the existence of which turn on facts not within the possession of the Commission at the RTB stage.

² The Commission has not required the complaint to accurately identify the specific legal theory that renders the alleged facts a violation of law.

³ My vote should not be understood to mean that I necessarily would have found at a later stage of this matter probable cause to believe a violation of law has occurred. In fact, what troubles me most about this matter is that I am being deprived of the very facts that I as a Commissioner would need to make that judgment.

The Ohio advertisement ran as follows:

Visual	Audio
McCain Photo over Pollution	
McCain Voted Against Clean Energy Paid for by Republicans for Clean Air McCain's Vote Means More Coal	
	Last year, John McCain voted against solar and renewable energy. That means more use of coal-burning plants that pollute our air.
NY SKYLINE W/ STATUE LIB BUSH NAME W/ SKY: BUSH	
	Ohio Republicans care about clean air. So does Governor Bush.
SMOKESTACKS W/ CLEAR DAWN Bush Clamped Down On Polluters	
	He led one of the first states in America to clamp down on old, coal-burning electric power plants.
BUSH PHOTO OVER GREEN FIELD Bush Signed Clean Air Laws	
	Bush clean air laws will reduce air pollution more than a quarter million tons a year.
YOUNG PEOPLE W/ CANOE	
	That's like taking five million cars off the road.
BUSH NAME W/ KIDS: Bush Let Bush & McCain Know You Back Clean Energy	
	Governor Bush. Leading . . . so each day dawns brighter.

Coordination:

The facts averred in the complaint support an allegation that RFCA may have made coordinated expenditures constituting over \$2,000,000.00 in unlawful in-kind contributions to the Bush campaign.

According to the complaint, "Charles Wyly is one of Governor Bush's 'Pioneers' – an elite team of authorized fundraising officials for the Bush for President Committee who have each raised at least \$100,000 for the campaign." Complaint at 2. The complaint cites several newspaper articles about the Pioneers that indicate the Pioneers were briefed on the campaign's spending plans and that the Pioneers' fundraising efforts were discussed with the Bush campaign. *See id.* The Bush Committee response confirms

that Charles Wyly was a "Pioneer" and "as such, is a contributor and an authorized fundraiser for the campaign." See George W. Bush for President Response at 3.

The complaint further alleges the advertisements aired "with the assistance of a political consultant, Jeb Hensarling, who is a former business partner of the chairman of the Pioneers." Complaint at 2. The RFCA response confirms that Sam Wyly "initially took his concept for such a group to Mr. Jeb Hensarling. Mr. Hensarling was an obvious choice for Mr. Wyly given Mr. Hensarling's long association with business and political organizations both in Texas and in Washington, D.C." RFCA, *et al.* Response at 2. According to the RFCA response, Hensarling then contacted a prominent election attorney to provide advice on "any potential election law issues" and "interviewed a number of Republican-oriented advertising specialists and media buyers." See *id.* at 3-4.

The complaint avers that when the ads first aired, the only address RFCA gave to television stations belonged to Lydia Meuret. Meuret was a friend of Hensarling's from "Texas Republican politics." See RFCA, *et al.* Response at 4. The complaint states that Meuret was "a consultant who works for a political action committee headed by U.S. Representative Henry Bonilla, a member of Governor Bush's exploratory committee and a fellow Texan." See Complaint at 1. The complaint further avers that Meuret acknowledged "allowing the use of her name to conceal the identity of the true sponsors." *Id.*

Further investigation is required to consider the connections between Charles and Sam Wyly and the Bush campaign, as well as Charles Wyly's involvement with the advertisements. Under the standards set forth in *Federal Election Commission v. Christian Coalition*, 52 F. Supp.2d 45 (D.C.D.C. 1999), the allegations contained sufficient specific factual allegations of coordination that if proven true would constitute a violation of the FECA. The Wyly brothers appear to have acted in concert, and Charles Wyly appears to have been an agent of the Bush campaign. Having assumed a position in the Bush campaign and held himself out to others as a representative of the campaign, it is difficult to see how Charles Wyly could establish his independence for the purpose of making an expenditure.⁴ The complaint also alleges that other individuals who had formal positions in the Bush campaign may have played a role in making these expenditures. These allegations are sufficiently specific to merit investigation. Applying the Commission's RTB standard to the complaint, I believe the complaint warranted an investigation and that without such an investigation the Commission would lack the necessary factual basis for concluding the matter. The summary dismissal of the complaint by a 3-3 vote regrettably denies the Commission the very evidence upon which it could render an informed decision as to whether this matter should be pursued.

⁴ Finding that Charles Wyly made a coordinated expenditure in violation of the contribution limits would not lead me necessarily to conclude that the Bush campaign violated 2 U.S.C. § 411a(f) by knowingly accepting an excessive contribution. An agent acting outside the scope of his authority may violate the law without triggering liability of his or her principal even though the violation redounded to the benefit of the principal.

Political Committee Status:

RFCA may have unlawfully failed to register and report as a political committee. The RFCA response indicates that "RFCA meets the criteria for a 'political organization' as that term is defined at section 527(e)(1) of the IRC," but asserts it is not a "political committee" as that term is defined at 11 C.F.R. 100.5(a)-(d)." See RFCA, *et al.* Response at 2. One must question an organization that effectively asserts to the IRS that it functions primarily to influence elections and subsequently claims to the FEC it does not. A Section 527 organization is defined as:

a party, committee, association, fund, or other organization ... organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both ... [for the purpose of] influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.

If an organization claims 527 status and does not confine its activities to state and local elections, one must question whether it is "influencing or attempting to influence the selection... of any individual to any Federal... office." Neither the responses nor the complaint indicates that RFCA had any involvement in any state or local election. In fact, from all accounts, it appears that the advertisements at issue have been the sole activity of RFCA.

Under FECA, any organization whose major purpose is to influence federal elections and who receives contributions or makes expenditures in the excess of \$1000 during a calendar year is considered to be a "political committee." See 2 U.S.C. § 431(4)(A) and *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). As a political committee, the organization is required to register and report to the Federal Election Commission, 2 U.S.C. §§ 433(a) and 434(a)(1), and to abide by the applicable contribution limitations and prohibitions. 2 U.S.C. § 441a. It is undisputed that RFCA receipts and disbursements were far in excess of \$1000. The only question then is whether RFCA's major purpose was to influence an election or elections to Federal office. RFCA has claimed to another Federal agency, the Internal Revenue Service, that it is primarily organized and operated to influence elections and therefore was entitled to the benefits of tax-exempt status. On its face this claim would appear to defeat any assertion that RFCA was organized and operated for any other purpose. This fact alone would satisfy me that RFCA's major purpose was to influence an election for Federal office. If I needed further convincing, I would need only to review the alleged content, timing and intended audience of the advertisement to conclude that RFCA was organized and operated for the exclusive purpose of influencing the election of the Republican nominee for President.

The Content of the advertisements:

The content of the advertisements focuses on the environmental records of Governor Bush and Senator McCain. The ad scripts provided by the complainant compare the positions of Bush and McCain, strongly implying that Bush is the stronger environmentalist. The ads inform the viewer that McCain voted against Clean Energy whereas Bush signed clean air laws. At the time, McCain was a Senator from Arizona. The ads did not run in Arizona, where McCain's constituency resides. The ads state that Bush signed clean air laws and clamped down on polluters. At the time, Bush was the Governor of Texas. The ads did not run in Texas, where Bush's constituency resided.

The advertisements implore the viewer to "Let Bush & McCain Know You Back Clean Energy." The ads provide no contact information in order to let the two candidates know one's views. The apparent means by which viewers would "Let Bush & McCain Know" their views would be by voting in the upcoming primary election.

The advertisements conclude with high praise for Governor Bush: "Governor Bush. Leading So each day dawns brighter."

One must question the relevance of Bush's gubernatorial record in Texas to the people of New York, Ohio and California, if not for the purpose of influencing the primary elections in those states. Hence, based on the advertisement scripts provided by Complainant, it would seem the content of the ads was for the purpose of influencing upcoming federal primary elections between Bush and McCain, in favor of candidate Bush.⁵

The Timing of the advertisements:

The advertisements aired in three states the weekend before they were to have their Republican presidential primaries. Bush and McCain were both candidates in these elections. California, New York and Ohio were each hotly contested primary states. The RFCA response states that the advertisements were not rebroadcast at any other time. See RFCA, *et al.* Response at 5. If your purpose is to influence an election, certainly a good time to act is the days immediately preceding the election. The timing of the ads strongly suggests that the ads ran for the purpose of influencing the federal election between Bush and McCain.

The Audience of the advertisements:

The response on behalf of RFCA and the Wyllys states that RFCA aims its advertising at American citizens generally, and "current and potential Republican Party

⁵ The fact that RFCA chose to accomplish its claimed purpose by running advertisements that unfavorably contrasted the environmental record of Senator McCain with that of Governor Bush is unremarkable. Indeed one would hope that most organizations seeking to influence an election would do so by discussing the issues on which the opposing candidates disagree. Certainly the Internal Revenue Service would consider such disbursements to be in furtherance of the organization's tax-exempt function, which is to influence the outcome of elections.

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supporters specifically." RFCA, *et al.* Response at 2. The RFCA response explains that because Sam Wyly hoped the advertisements "would have the maximum desired impact on the public, opinion leaders, the news media and those Republican Party supporters who might be sympathetic to the message, he decided to purchase time and air the advertisements in New York State, Ohio and in the San Francisco area of California." *Id.* at 4. RFCA never rebroadcast the advertisements. *See id.* at 5.

As stated above, the intended audience of the ads was not the constituency of the candidates in Arizona or Texas. Rather, the advertisements ran in New York, Ohio and California. The targeted audience was not simply the general populace either, but rather Republicans in those states. The advertisement in Ohio read, "Ohio *Republicans* care about clean air." [emphasis added] The advertisements presented a comparison of the environmental records of a Texas governor and a senator from Arizona to Republican audiences in New York, Ohio and California on the weekend before the primary election in each of those states. The advertisements concluded, "Governor Bush. Leading So each day dawns brighter." Again, if one's purpose is to influence the outcome of a primary election, the best way to do so is to direct your message to the voters in that election.

It seems apparent, looking at the content, timing, and intended audience of the advertisements, that indeed RFCA was organized and operated for the purpose of influencing a federal election. Having claimed to the Internal Revenue Service that its primary purpose was to influence the outcome of elections, RFCA appears to have operated at all times consistent with that purpose by attempting to influence the outcome of the Republican Presidential primaries in the states of New York, California and Ohio. If the facts alleged in the complaint are indeed true, then RFCA would have violated the FECA by failing to register and report with the Commission and to abide by the law's contribution limits. Therefore, I voted to find reason to believe the advertisements may have violated FECA in order to investigate the facts underlying the complaint.

Ending this matter without any investigation means the Commission has not assured itself and certainly cannot assure the complainant and the public that the very serious violations alleged in the complaint did not in fact occur. Nor can the 3-3 vote that concluded this matter satisfactorily provide the vindication to which some or all of the respondents might be entitled.

April 26, 2002


Karl J. Sandstrom, Vice Chairman

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